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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1085

IKE DOVBERG and MAURICE DOVBERG, Individually and t/a PASTE COMPANY OF AMERICA,
Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners, Ike Dovberg and Maurice Dovberg, individually and trading as Paste Company of America, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit

affirming the entry of judgment for the defendants notwithstanding a jury verdict for the plaintiffs in this civil antitrust suit.

OPINIONS BELOW

The opinions of the Court of Appeals -- consisting of a Majority Opinion written by Circuit Judge J. Cullen Ganey and concurred in by four other judges and a Dissenting Opinion written by Chief Judge Harry E. Kalodner and concurred in by former Chief Judge John Biggs and Judge Austin L. Staley -- are included in the Appendix to this Petition (App. 2a-35a). The opinions are also reported in 353 F.2d 963.

JURISDICTION

The judgment of the Court of Appeals (App. 26a) was entered on December 3, 1965. The jurisdiction of this

Court is invoked under 28 U.S.C. §1254 (1). The jurisdiction of the trial court was based on the Clayton Act, c. 323, §4, 38 Stat. 731, 15 U.S.C. §15.

QUESTIONS PRESENTED

1. Where a jury, after a four month trial, has returned a verdict for the plaintiffs based upon a finding of conspiracy in violation of the Sherman Act, may that verdict be set aside and judgment entered for the defendants notwithstanding the jury's verdict:

(a) By a trial judge who, after recessing the case for one week to consider the plaintiffs' evidence, of which there was a daily transcript, denied the defendants' Motions for a Directed Verdict in a 75-page Memorandum in which he exhaustively reviewed the

plaintiffs' evidence and concluded that it was sufficient "to raise a substantial issue of fact as to the truth of" plaintiffs' complaint?

(b) By a trial judge who, at the close of all the evidence, has submitted the case to the jury on the basis of a 39-page Charge, to which the defendants took no material exception, in which Charge the judge stated that, on the basis of the evidence, the issue of conspiracy was for the jury to decide?

(c) By a trial judge who, after the jury's verdict, files only a brief "Order and Direction for Judgment" in which he concludes, without citation of pertinent legal authority, that there was "a total failure and lack of evidence to prove the essential elements of conspiracy"?

(d) By a Court of Appeals which, with a dissent joined in by the past and present Chief Judges (who also constituted two of the three judges who heard argument initially and read the entire record), affirms the entry of judgment N.O.V., but on a ground entirely different from that on which the trial judge rested in entering judgment, which basis involves a purely factual determination by the Court of Appeals in conflict with the jury's finding and the evidence which supported that jury finding?

2. Whether the Sherman Act applies to dealings between relatively small businesses in the stream of interstate commerce, or whether evidence which would justify a finding of conspiracy if the defendants were large businesses is

to be viewed in a different light where all of the businesses are small?

STATUTE INVOLVED

Section 1 of the Sherman Act, c.647, 26 Stat. 209, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

STATEMENT OF THE CASE

1. The Parties. From 1950 until 1957, in a factory in Philadelphia which they owned and had equipped for manufacturing their products, petitioners, Ike Dovberg and Maurice Dovberg, father and son, trading as Paste Company of America, purchased raw materials in the stream of interstate commerce, manufactured their products from these materials, and sold

those products in Philadelphia and also, through a national distributor, elsewhere in the eastern United States. Petitioners' principal product was their wall size eliminator, a product known as Nix-Size.[1] Petitioners also manufactured and sold a wet wallpaper paste and a cellulose base wallpaper paste.

Pennsylvania Paste Company ("Papco"), -- one of the respondents here -- is a Pennsylvania corporation which, at the time in issue and for many years before then, leased a factory building in Philadelphia and there manufactured wet wallpaper paste and related products which

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1. A wall size eliminator is a product which, when added to a conventional wallpaper paste, renders a separate sizing operation unnecessary.

were sold to retailers in Philadelphia and in states adjacent to it. Papco's plant was approximately the size of the petitioners' plant, and its annual business approximated $150,000.

Samuel Schultz & Company -- whose partners constitute the other respondents -- is a partnership consisting of Samuel Schultz, his wife, and their two sons-in-law. The Schultz firm is the largest retailer of wallpaper and paints in the Philadelphia area, where it operates approximately seven stores.

2. Procedural History. Petitioners' Complaint, as amended, named as defendants Papco, the Schultz firm, seven other retail firms which at one time sold petitioners' products in Philadelphia and Camden, New Jersey, and Dow Chemical Company, supplier of the principal ingredients of petitioners' cellulose-base

wallpaper paste. However, prior to trial, petitioners voluntarily eliminated five of the eight retailer defendants, and at the trial petitioners elected to present no evidence against a sixth retailer whose original counsel became ill on the eve of trial.

Shortly before trial, all of the then defendants filed Motions for Summary Judgment. These Motions were denied by Judge Paul Leahy with an Opinion (195 F.Supp. 337).

Trial -- before Judge Leahy and a jury -- began on November 28, 1961 and concluded on March 29, 1962. It was the longest trial in the history of the Eastern District of Pennsylvania. The defendants against whom petitioners presented evidence were Papco, Dow, Schultz and another Philadelphia retailer of wallpaper products, Atlas.

First of all, petitioners charged Papco with attempting to monopolize; more specifically, petitioners charged that from 1950 through 1957, Papco engaged in a continuous campaign -- which was ultimately successful -- to destroy their business. At trial, petitioners showed that Papco's principal -- and most profitable -- product was wet wallpaper paste; that Papco supplied about 50% of that product in the Philadelphia market, but that there was a declining market for the product. Petitioners also showed that, in the latter part of 1950, after petitioners began manufacturing wet wallpaper paste, Flanagan, the proprietor of Papco, told Maurice Dovberg that Papco was going to put petitioners out of business because they were manufacturing wet paste. Petitioners also showed that Papco then mounted

not only a direct attack on their sales of wet paste -- characterized by stealing petitioners' expensive, returnable wet paste containers, imitation of petitioners' wet paste package, and a price cut on wet paste -- but that Papco also mounted an indirect attack against petitioners. The indirect attack consisted of Papco's manufacturing and selling below cost a wall-size eliminator known as Liqui-Size which, in form, composition and packaging, was a conscious, but inferior, imitation of petitioners' principal product, the wall-size eliminator known as Nix-Size (App.21a-26a,61a-75a).

Second, petitioners charged Papco with conspiring to restrain interstate commerce by inviting petitioners' customers to cut off their purchases of Nix-Size, purchase Papco's cheaper imitation instead, and market it to the

public as petitioners' product or the same thing as petitioners' product. The retailer defendants, including Schultz, were charged with conspiring with Papco by accepting its invitation with knowledge of why it was being tendered and discontinuing their purchases of Nix-Size, purchasing Liqui-Size instead, and selling it to the public as Nix-Size under a private label or "the same thing as" Nix-Size (App.65-a78a,81a-82a).

Petitioners charged that Dow, which owned patents covering some uses of two of the principal ingredients of petitioners' patented cellulose base wallpaper paste and believed that it was not in Dow's interest to have petitioners in a position to enforce patents covering this new use of these products, knowingly cooperated and thereby conspired with Papco's effort to drive petitioners

out of business by supplying petitioners' competitors in the manufacture of cellulose base paste with a cheaper cellulose base which was not made available to petitioners and selling that product to the competitors at prices which were lower and on credit terms which were superior to those which Dow offered petitioners (App. 38a-43a).

At the conclusion of the petitioners' evidence, all defendants moved for directed verdicts of dismissal. The trial judge recessed proceedings for one week and then filed a 75-page Memorandum (App. 37a-109a) in which he denied the defendants' Motions. In this Memorandum, annotated to the daily transcript of the petitioners' evidence made in the course of the trial, the trial judge noted that petitioners' evidence as to Dow was "thin" (App. 103a) and that

their evidence with respect to Atlas was "weak" (App. 93a). However, as was pointed out later in the Dissenting Opinion in the Court of Appeals (App. 32a-35a), the trial judge expressly found that there was evidence sufficient to sustain a jury finding against Papco and Schultz. The conclusions in the trial judge's Memorandum which the dissenting judges in the Court of Appeals regarded as having particular significance (App. 18a-19a, 32a-33a) were these:

> "While the great bulk of it [plaintiffs' testimony] was hearsay, there does appear to be a modicum of direct testimony admitted to raise a substantial issue of fact as to the truth of the allegation . . . . Pennsylvania Paste's motion is denied. A sufficient quantum of evidence has been adduced by plaintiffs to allow the case against this defendant to go to the jury. Evidence has been adduced, for example, as to alleged

statements of Mr. Flanagan, of Pennsylvania Paste's intent to force plaintiffs out of business; of Pennsylvania Paste placing on the market Liqui-Size with the intent to force plaintiffs out of business; of Pennsylvania Paste's costs being the same or higher than those of plaintiffs; of Pennsylvania Paste selling its product for prices below cost; of Pennsylvania Paste taking butter tubs belonging to plaintiffs. In short, sufficient factual questions have been presented by plaintiffs to allow the jury to rule on the issues."[2]

* * * * * * *

"'Schultz is charged with "discontinuing and refusing to resume . . . [his] purchases of wall size eliminator" from plaintiffs, "with knowledge of Pennsylvania Paste's intent" to drive the plaintiffs out of business.

"'Evidence has been introduced of Schultz'

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2. The emphasis is that supplied by the dissenting judges in the Court of Appeals.

> discontinuance of purchases from plaintiffs and his refusal to resume purchases. Evidence has also been introduced to the effect that plaintiff Dovberg told Schultz of Pennsylvania's alleged intent and that Schultz was aware of it . . .
>
> "'Plaintiffs charge that "at the instigation of Pennsylvania Paste . . . [Schultz] sold the wall size eliminator . . . purchased from Pennsylvania Paste as being, or being the same thing as Nix-Size". Substantial evidence has been introduced to this effect.'"

After their Motions for Directed Verdict were denied, the defendants presented extensive evidence and, at the conclusion of all the evidence, counsel spent five days addressing the jury, to whom the issues were then submitted in a Charge (App.110a) which the trial judge gave to counsel in

advance,[3] inviting their suggestions.

The jury deliberated for approximately 24 hours before returning their verdict. On the conspiracy charge, the jury returned a $22,000 verdict against Papco and Schultz. But they found that the second retailer, Atlas, and the chemical company, Dow, were not liable. The jury also concluded that Papco was not liable on the charge of monopoly.

The verdict for petitioners was trebled, and judgment was entered on it. Papco and Schultz filed post-trial motions, and on November 7, 1962, the trial judge filed a brief Order and Direction for Judgment. He stated that "***all and every item

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3. As submitted to counsel, the Charge was annotated with case authorities to support each principle of law which it enuniciated. There were no substantial exceptions taken to the Charge by the parties.

of alleged error has been critically analyzed and evaluated and *** the Court concludes there was no prejudicial error in the admission of testimony, rejection of testimony, or manner of the submission of the issues to the Jury, or in the Charge to the Court, when taken in full context, for it was an accurate presentation of the law."

Then, without detailed discussion of evidence or citation of pertinent legal authority, the trial judge concluded (App.17a) that there had been a "total failure and lack of evidence to prove the essential elements***relating to guilt of Samuel Schultz & Co." Accordingly, both defendants were held to be entitled to judgment, since Papco could not conspire with itself.

Also, said the trial judge (App. 17a), the verdict was against the

the weight of the evidence because Maurice Dovberg's testimony "ranged from***deliberate obfuscation to***deliberate fabrication,***and from fantasy to the bizarre." Therefore if his entry of judgment N.O.V. were reversed, the trial judge awarded the defendants a new trial.

Petitioners' appeal to the Court of Appeals questioned the propriety of entering judgment N.O.V. or awarding a new trial, but since that Court ultimately passed only on the entry of judgment N.O.V we are not in a position to ask this Court to review the alternative award of a new trial at this time. However, the Court should know that the sole basis assigned for the award of a new trial was the trial judge's stated disbelief of the testimony of Maurice Dovberg.

Dovberg was on the witness stand on 35 trial days and his testimony covered more than 4300 pages of daily transcript (App. 21a) which was used as a basis for cross examination and jury argument by the four defense counsel. At no time during the four-month trial, either in the presence of the jury or outside the presence of the jury, had the trial judge stated, or even implied, that in his opinion Maurice Dovberg's credibility was such that the jury had no right to believe him. Furthermore, the only references to the record which the trial judge cited to support his own rejection of Dovberg's testimony were to four excerpts from Dovberg's testimony, none of which dealt with a material issue, none of which established that Dovberg told a material falsehood to the jury, and which represented testimony

which Dovberg gave on the 19th, 24th, 25th and 33rd days he was on the stand.

Petitioners' appeal was argued originally on September 26, 1963 before a panel consisting of the then Chief Judge of the Court of Appeals, John Biggs, the present Chief Judge of that Court, Harry E. Kalodner, and Judge J. Cullen Ganey. At the conclusion of the argument, Judge Biggs stated that each member of the panel would review the entire record before the case was decided. Two of the three judges on the panel ultimately voted to reverse the entry of judgment N.O.V.

However, on October 7, 1965, two years after the initial argument, the case was reargued before the full Court of eight judges on the Court's own motion. On December 3, 1965, less than

two months after the reargument, Judge Ganey, supported by four other judges, filed his Opinion (App. 2a) sustaining the entry of judgment N.O.V., and Chief Judge Kalodner, joined by former Chief Judge Biggs and Circuit Judge Staley, filed his Dissenting Opinion (App.15a).

As the dissenters pointed out (App. 31a), the trial judge, in entering judgment N.O.V., did not conclude that the evidence was not sufficient to sustain the jury's implicit finding that Papco acted to destroy petitioners' business. Neither did the majority in the Court of Appeals question that finding. Both the trial court and the majority in the Court of Appeals bottomed their decisions on conclusions that the evidence was insufficient to support the jury's finding that Schultz conspired with Papco against petitioners. To

justify this conclusion, the majority of the Court of Appeals made no reference whatever to the reasons which the trial judge had cited to support his conclusion. Instead, the majority of the Court of Appeals affirmed on the basis of reasoning entirely at variance with that of the trial judge and on a theory which had not even been advanced in the brief filed in that court on behalf of Schultz.

3. The Basis for the Jury's Verdict. Petitioners' evidence against all defendants is outlined in the trial judge's Memorandum denying the defendants Motions for Directed Verdict (App. 37a) and summarized substantially in the Dissenting Opinion in the Court of Appeals (App. 15a). In view of the issue presented by this Petition, it is sufficient

to note that the following evidence, under well settled principles, justified the trial judge's submission of the issue of a conspiracy between Papco and Schultz to the jury and upholds the jury's finding of conspiracy.

The trial judge charged as follows (App. 120a):[4]

> "***Express agreement is not required between conspirators. It is enough that uniformity of action is contemplated by the defendants and that the defendants conformed to the arrangement. If any party understands that another wants him to pursue a particular business policy, the effect of which in view of the policies adopted by the other will be an unreasonable restraint of trade, and if he adopts that policy, knowing it will result in an unreasonable restraint of trade, and it does

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4. Footnotes 5-9 are those with which the trial judge annotated the draft of his Charge which he submitted to counsel in the course of the trial.

result in such restraint of trade, then he and his associate or associates are guilty of conspiracy in violation of the Anti-Trust Laws.[5]

"Neither formal agreement nor direct communication is required among conspirators. Conspiracy may be found in a course of dealing or other circumstances, as well as in an exchange of words. It can be proved by circumstantial evidence, evidence which without going directly to prove the existence of an asserted fact gives rise to a logical inference that such asserted fact does in fact exist. But before a conspiracy can be said to have been proved by such circumstantial or inferential evidence alone, it is necessary not only that the circumstances proven by the evidence shall reasonably give rise to an inference of conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from the

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5. UNITED STATES v. MASONITE CORP., 316 U.S. 265, 275 (1945); WILLIAM GOLDMAN THEATRES, INC. v. LOEW'S, INC., 3 Cir., 150 F.2d 738, 743-744 (1946)

circumstances proved by the evidence, one consistent with the evidence of a conspiracy and the other inconsistent, you should not infer the existence of conspiracy from such evidence alone."[6]

The court further charged, again without exception by counsel (App. 125a):

"A conspiracy may be inferred***if on the basis of all the evidence submitted***, you conclude that the action of the retailer defendants***in allegedly refusing to deal with the plaintiffs, or in dealing with plaintiffs in the allegedly discriminatory manner alleged by plaintiffs was not a matter of sheer coincidence.[7] Evidence tending to show that there was a legitimate business reason for the act of defendant retailers***in allegedly refusing to deal with plaintiffs, or in dealing with the plaintiffs in the allegedly discriminatory manner alleged,

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6. AMERICAN TOBACCO CO. v. UNITED STATES 328 U.S. 781, 809-810 (1946).
7. WILLIAM GOLDMAN THEATRES v. LOEW'S, INC., 3 Cir., 150 F.2d 738, 743 (1946)

> is admissible to refute the conspiracy based on circumstantial evidence; but if the overall evidence is sufficient to support an inference that the defendants entered into a conspiracy with Pennsylvania Paste Company, the fact that a defendant's individual refusal to deal, or apparently discriminatory dealing, may be explainable as a reasonable business decision will not of itself justify his conduct or deprive it of its illegal character.***"8

With this statement of the law in mind, we shall discuss the evidence.

The evidence as to Papco (App. 68a-78a) justified the jury in concluding that, throughout the period in controversy, pursuant to an announced intention to destroy petitioners' business, Papco marketed, at less than cost, a cheaper, less effective imitation of Nix-Size in a deceptively similar pint package and encouraged retailers to

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8. Steel, J., Charge to Jury (Tr. 3771) DELAWARE VALLEY MARINE SUPPLY CO. v. AMERICAN TOBACCO CO., 184 F.Supp. 440, aff'd. 297 F.2d 199 (1961).

purchase this product instead of Nix-Size and to sell it to the public as Nix-Size or as the same thing as Nix-Size. In other words, there was evidence from which the jury could conclude that, throughout the period of controversy, Papco invited retailers "to pursue a particular business policy, the effect of which, in view of the policies adopted by" Papco, was "an unreasonable restraint of trade" -- the destruction of petitioners' business.

The evidence showed that Papco had been carrying on this campaign against petitioners for eighteen months on March 14, 1952, when the Schultz firm stopped purchasing Nix-Size and commenced purchasing Papco's Liqui-Size. Indeed, the evidence (App. 74a,

86a-89a)[9] shows that Schultz joined Papco at the very time the Papco campaign became most effective, i.e., when Papco chose to change the packaging of Liqui-Size so that the package was identical, except for the label, with the packaging of Nix-Size.

There was evidence (App. 83a-86a)[9] that, in the year preceding Schultz's switch to Papco, Samuel Schultz had become disenchanted and angry with petitioners because they had objected to the Schultz firm's cutting the retail price of Nix-Size and to the Schultz firm's unlicensed repackaging

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9. These references are to the summary of the evidence in the Dissenting Opinion in the Court of Appeals. References to the original record are found in petitioners' original brief in the Court of Appeals at pp. 16-19.

of Nix-Size for resale to the public under a private label and at a cut-rate price.

There was evidence[10] that, while Papco's product was one of several similar products available to Schultz -- some of them nationally advertised and some of them also available under private labels -- when the Schultz firm chose to discontinue purchasing Nix-Size, they elected then to purchase Liqui-Size, the only product which, to their knowledge, was then being marketed solely to hurt petitioners.

There was evidence (App. 86a-87a) that Samuel Schultz was aware

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10. See Petitioners' original brief in Court of Appeals, p. 19.

that Papco was "gunning" for petitioners in November, 1951 and that he was specifically advised by Maurice Dovberg on March 13, 1952 that Liqui-Size was being offered to him at cut-rate prices in an effort to put petitioners out of business, and that if Schultz did anything to assist Papco in that effort, petitioners would hold the Schultz firm equally responsible with Papco.

There was evidence (N.T. 303, 933-940, 2491, 2582, 4040, 4062) that the Schultz firm, like Papco and other retailers to whom Papco sold Liqui-Size, blatantly represented the product as being Nix-Size, or being the same thing as Nix-Size, when it was resold to the public, but that this practice was not characteristic of those who marketed

other products which competed with Nix-Size.

In DELAWARE VALLEY MARINE SUPPLY COMPANY v. AMERICAN TOBACCO COMPANY, 297 F.2d 199 (1961), Cert. den., 369 U.S. 839 (1962), the Court of Appeals for the Third Circuit noted (297 F.2d 206):

> "***Many of the decisions in which courts find conspiracy on the basis of circumstantial evidence do so because the defendants acted in apparent contradiction of their own economic self-interest.***"

See also, in accord, BORDONARO BROS. THEATRES v. PARAMOUNT PICTURES, 176 F.2d 594 (2nd Cir., 1949).

The evidence in the present case showed that, even though Liqui-Size was not as effective as Nix-Size and did not sell as well nor produce as large a mark-up per item as Nix-Size when Schultz sold it to the public, the Schultz firm,

after March 14, 1962, continued to purchase and resell Liqui-Size exclusively and continued to refuse to deal with petitioners (App. 28a, 89a-90a).

The trial judge, without exception from the defense, charged the jury (App. 124a):

> "You should consider all the reasons parties in this suit have given for their acts. If they seem to you to be honest ones, advanced in good faith, you should take that into account in determining what happened. If they seem dishonest, hastily made, advanced in bad faith, you would [sic] take that into account."

At trial, the Schultz firm's evidence was that they discontinued purchases of petitioners' wet paste because of customer complaints about the "very strong odor of oil of wintergreen" (Spiro Tr. Mar. 5, p. B-22)[11]; but at a

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11. The references in this paragraph and the next are to the original transcript of the evidence.

discovery deposition given by Samuel Schultz (Spiro Tr. Mar. 5, p. B-72), Samuel Schultz could not even recall purchasing petitioners' wet paste (Schultz Tr. Mar. 8, pp. E-43-45).

Two of the reasons which the Schultz firm assigned at trial for their refusal to deal further with petitioners were the tone of a letter (Exhibit P-106) which they received from petitioners dated March 13, 1952, and petitioners' refusal to lower the price of Nix-Size then (Spiro Tr. Mar. 5, B-57-58). However, the letter referred to a conversation in which Schultz had already informed Dovberg of Schultz's decision to discontinue Nix-Size purchases. Furthermore, in discovery, Samuel Schultz, testifying in the presence of Spiro, had not even mentioned price as a consideration which led his firm to discontinue

purchases of Nix-Size, and he could not even recall receiving the allegedly offensive letter (Schultz Tr. Mar. 8, pp. E-54-59).

Accordingly, the jury had the right under the Charge to infer that an improper goal actually motivated the Schultz firm in discontinuing all business with petitioners, because the reasons to which the Schultz partners testified were "dishonest, hastily made, advanced in bad faith."

4. The Courts' Stated Reasons for Entering Judgment N.O.V.

(a) Failure to Prove Motive.

In ignoring the controlling authorities and reversing his own carefully considered and well documented original conclusions that petitioners had presented a case for the jury as to

Papco and Schultz, the trial judge assigned as one of his two reasons the alleged fact that (App.17a), "No evidence has been adduced indicating any plausible or rational motive for" the Schultz firm to conspire to force petitioners out of business.

The trial judge cited no case authority to justify the entry of judgment on this basis, because no such authority exists. It has long been established that the "***motives and intentions, except as declared, or appearing from the character of the act, are too vague and difficult of ascertainment to be made the basis of the legal judgment called for in such cases.***" UNITED STATES v. MOTION PICTURE PATENTS CO., 225 Fed. 800, 806 (E.D. Pa. 1915). See, also, AMERICAN BISCUIT MANUFACTURING

CO. v. KLOTZ, 44 Fed. 721 (E.D.La.,1891); WIGMORE ON EVIDENCE (3rd Ed. 1940) §118, pp. 558-559.

(b) Failure to Relate Knowledge to Actions. The second reason assigned by the trial judge for entering judgment for the defendants was (App. 17a):

> "All testimony concerning acts of Samuel Schultz & Co. for 1952-56 period indicates it did nothing more than purchase wall size eliminator from Pennsylvania Paste and end purchases from plaintiffs, and ***All testimony of alleged sales of Pennsylvania Paste manufactured wall size eliminator 'as being or being the same thing as' plaintiffs' Nix-Size relates to acts in 1956 and 1958***."

Even the able and experienced counsel for the Schultz firm had made no such argument in the brief submitted to the judge in support of Schultz's

Motion for Judgment N.O.V., and the argument has no validity.

Apart from the evidence of "passing off" of which Schultz was shown, by six witnesses, to have been guilty in 1956 through 1958, petitioners proved that, subsequent to March of 1952, the Schultz firm, reacting to petitioners' complaints concerning its price cutting and unauthorized repackaging and relabelling of Nix-Size, joined many other Philadelphia retailers in refusing to purchase petitioners' superior wall size eliminator; purchased Papco's inferior product; marketed it in a package very similar to that of the petitioners' (and to that of no other competitor); persisted in its refusal to deal with petitioners even when to do so would have accorded with Schultz's economic interests,

and did all of this with knowledge that the product which Schultz was purchasing and reselling was being marketed in this way by the manufacturer solely to destroy petitioners' business. From this evidence alone, under the Charge of the Court and the authorities cited, supra, (at pages 24-27) the jury could properly have found that the Schultz firm conspired. Accordingly, the fact that petitioners did not affirmatively prove in addition that the Schultz firm also sold Liqui-Size as Nix-Size, or the same thing as Nix-Size, before 1956 in no way entitled defendants to judgment. As this Court noted in NYE & NISSEN v. UNITED STATES, 336 U.S. 613, 617 (1949):

> "***The fact that certain types of***practices occurred during one period and other types at different periods is without significance.***There

was an abundance of evidence, ***from which the jury could conclude that there was one continuous and persistent conspiracy***."

(c) Schultz did not Participate in the Conspiracy to Prevent Petitioners from Manufacturing Wet Paste. As we have noted before, the majority in the Court of Appeals made no effort to justify the entry of judgment N.O.V. on either of the grounds which the trial judge assigned for his action. Instead, the Court of Appeals followed a different tack. Broadly stated, its reasoning was as follows:

(i) Petitioners charged Papco with having conspired with other defendants to destroy petitioners' business and thereby preserve Papco's dominant position in the wet paste manufacturing business in the Philadelphia

area (App. 5a).

(ii) Petitioners admitted that Papco had forced them out of the wet paste business in January, 1951; that thereafter petitioners made wet paste only on rare occasions and for a few special customers (App. 9a).

(iii) Schultz did not stop purchasing petitioners' products and commence purchasing those of Papco until March 14, 1952 (App. 12a).

(iv) Therefore, "a critical examination of this record shows, neither directly nor by circumstantial evidence, any conspiratorial conduct on the part of Schultz with the Pennsylvania Paste Company to drive the plaintiffs, Dovberg, out of business, in order to preserve Pennsylvania Paste Company's dominant position in the wet paste industry" (App. 14a).

Not only was this reasoning not the basis on which the trial court entered judgment, but such reasoning was not advanced in the Schultz brief on appeal. The reasoning is fallacious for several reasons.

The sequence of events establishes that Papco did not initiate any campaign against petitioners until the late summer and early fall of 1950 when petitioners, who had been manufacturing Nix-Size since 1948 without competition from Papco, commenced manufacturing and selling substantial quantities of wet paste, which was Papco's principal and most profitable product. It was at this time that Flanagan of Papco told Dovberg that, because petitioners were manufacturing wet paste, Papco would "reduplicate and manufacture any product that we make as our product, ***outproduce, undersell***suffer losses

until such time as [Papco] would put petitioners out of business." (App. 65a).

The evidence also shows that, after making this threat, Papco mounted a two pronged attack on petitioners. The direct attack consisted of stealing petitioners' returnable wet paste containers, imitating petitioners' new wet paste package, and selling paste in that package at cut prices. The second prong of the attack consisted of marketing Liqui-Size, a cheaper, less effective imitation of Nix-Size, selling it to retailers below the cost of manufacture, and encouraging the retailers to stop purchasing Nix-Size, purchase Liqui-Size instead, and sell it to the public as being Nix-Size under a private label or the same thing as Nix-Size (App. 63a-68a).

The evidence also shows that, while Papco was able to abandon the first prong of its attack when petitioners discontinued large scale sales of wet paste in the spring of 1951, Papco continued to press its indirect attack -- through the marketing of Liqui-Size -- as long as petitioners remained in business. Since this campaign entailed Papco's selling Liqui-Size at a loss and Papco was primarily a paste manufacturer, the jury had the right to find that the campaign was pressed because petitioners continued to manufacture some wet paste, continued to advertise the product,[12]

12. The majority of the Court of Appeals makes no allusion to this fact, which is emphasized in the Dissenting Opinion (App. 24a). Maurice Dovberg did testify that Papco's tactics forced petitioners to discontinue large scale marketing of wet paste in 1951; however, he also stated that petitioners continued to supply the product to special customers thereafter (N.T. 2427-
(Footnote continued)

and retained the same ability to manufacture the product that they possessed initially. This same campaign was continuing in March, 1952 -- was, indeed, intensified when Schultz chose to join it, and since there was evidence from which the jury had the right to infer that Schultz acted knowingly and with malice toward petitioners, the verdict

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12. (Footnote continued)
2432) and continued to advertise the product (N.T. 3004-3005). There are 36 exhibits which originated subsequent to Schultz's switch to Papco which include such advertisements. Of these, the most significant is Exhibit D-236, an invoice dated March 14, 1952, which petitioners submitted to the Schultz firm, and which the Schultz firm paid the day after the parties discussed Schultz's plan to switch from Nix-Size to Liqui-Size; in the upper portion, this invoice notes that petitioners manufacture wet and dry paste; in the lower portion of the invoice, the products advertised include: "Wet Paste: 8½ Gallon Drums, 4 Gallon Drums, Waterproof Cartons."

was proper under the evidence and the charge of the Court.

It is true that Schultz did not act as it did primarily to help Papco dominate the wet paste business. However, it is not necessary for each party to a conspiracy to have the same motive for accomplishing the objective of the conspiracy, as long as that object -- in this instance the destruction of a business -- is the same. See CAPE COD FOOD PRODUCTS v. NATIONAL CRANBERRY ASS'N., 119 F. Supp. 900 (D. Mass., 1954), a decision of Judge Charles Wyzanski discussed on pages 21-22 of our original brief in the Court of Appeals.

Accordingly, if Papco was carrying out a campaign to destroy petitioners' business in order to preserve Papco's dominant position in the wet paste industry in the Philadelphia area, the

jury had the right to find that Schultz became party to a conspiracy with Papco by knowingly adopting the "particular business policy" suggested by Papco, i.e., discontinuing purchases of Nix-Size and, instead, purchasing and reselling Papco's cheaper and less effective imitation of Nix-Size as Nix-Size, because the jury had a basis for finding that Schultz acted as it did primarily to injure petitioners after petitioners had angered Samuel Schultz by refusing to permit him to make a "football" out of their product.

REASONS FOR GRANTING THE WRIT

This Court has held that, in a case of this type, presented in the posture of the present case immediately before the jury verdict, the evidence must be viewed in the light most favorabl

to petitioners.[13] So viewed, as the dissenting judges in the Court of Appeals noted (App. 15a), the evidence "reasonably permitted the jury's finding that the defendant Pennsylvania Paste Company***acted to destroy the plaintiffs' business, and the defendant Samuel Schultz & Co.***was aware of its purpose and design, and that it acted in concert with Pennsylvania to accomplish it."

In KLOR'S v. BROADWAY-HALE STORES, 359 U.S. 207 (1959), this Court reversed decisions of a district court and a

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13. CONTINENTAL ORE CO. v. UNION CARBIDE & CARBON CORP., 370 U.S. 690, 696, 697 (1962). That case also involved a trial judge's improper resolution of a jury issue in a civil anti-trust case and an attempt by a court of appeals to uphold the trial judge on a basis -- which this Court also concluded was erroneous -- never advanced by the trial judge.

court of appeals granting summary judgment for the defendants in a civil antitrust case. This Court stated (at p. 213):

> "***It (the conspiracy) interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character', a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.***"

In RADIANT BURNERS v. PEOPLES GAS CO., 364 U.S. 656 (1961), another civil antitrust case, this Court reiterated the principle applied in KLOR'S in granting certiorari and reversing judgments entered for the defendants as a matter of law. On that occasion, where the defendants were an associated group of larger businesses, this Court pointed

out (364 U.S. 660):

> "By §1, Congress has made illegal: 'Every[14] contract, combination...or conspiracy, in restraint of trade or commerce among the several States...' Standard Oil Co. v. United States, 221 U.S. 1. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

POLLER v. COLUMBIA BROADCASTING SYSTEM, 368 U.S. 464 (1962), is another civil antitrust case. There again, this Court granted certiorari and reversed in order to emphasize the importance of affording litigants a jury trial

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14. This emphasis has been supplied by the writer of this Petition.

of the issues. The Court said (368 U.S. 467):

> "***This rule [Rule 56-c] authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,...[and where] no genuine issue remains for trial...[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) ***

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> "***We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.***" 368 U.S. 473.

While the foregoing cases dealt with the general impropriety of entering

summary judgment for defendants in civil antitrust cases, this Court, even more recently, had occasion to consider the same principles in the context of a jury trial. See CONTINENTAL ORE CO. v. UNION CARBIDE, 370 U.S. 690 (1962), supra. In view of the singularly frail reed on which the majority of the Court of Appeals has rested its conclusion in the present case, the following statement by this Court in the CONTINENTAL ORE case is particularly relevant here (370 U.S. 699):

> "***[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544...; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' American Tobacco Co., v. United States, 147 F.2d 93, 106

(C.A. 6th Cir.). See Montague & Co. v. Lowry, 193 U.S. 38, 45-46.

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> "Undoubtedly, all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 35."

There are two material differences between the present case and those just cited, and these differences are the reasons why, we submit, this Court should grant certiorari and reverse.

1. First of all, in this instance, the trial judge, following the mandates which this Court laid down in the cases cited above. wrote careful opinions

denying motions for summary judgment and for a directed verdict at the conclusion of the petitioners' evidence. Then, with no recent holding by this Court to govern him, he departed entirely from his original conclusions and entered judgments N.O.V. at the conclusion of the four-month trial, and his decision was affirmed by a sharply divided Court of Appeals on the flimsiest of excuses. Clearly, if the policy which this Court has so frequently announced as governing at earlier stages in civil antitrust litigation is to reach fruition, that policy should be reaffirmed in a case where the jury has rendered its verdict.

2. There is a second reason, even more important, why we urge that certiorari be granted here. In the present

case, not only were petitioners small businessmen, but the defendants against whom the jury returned a verdict, while they had businesses substantially larger than was that of petitioners, were also proprietors of relatively small businesses. We feel that it is this circumstance which caused the trial judge — one well seasoned in antitrust litigation[15] — to do "a complete about face" - as the dissenting judges in the Court of Appeals noted (App. 35a) -- and enter judgment for the remaining defendants N.O.V. after the jury, by its verdict, acquitted Dow Chemical Company, the only "large" defendant in the case. In doing so, the trial judge initially, and the majority of the Court of Appeals

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15. In 1945, the trial judge wrote the oft-cited opinion in WILLIAM GOLDMAN THEATRE v. LOEW'S, INC.,150 F. 2d 738.

in affirming his decision, was obliged to ignore all of the well settled principles of law which he himself had stated previously were applicable to the evidence which petitioners presented.

Certain comments in the Opinion adopted by the majority of the Court of Appeals refer to alleged inconsistencies in Maurice Dovberg's testimony as to Schultz (10a, 12a) and indicate that Judge Ganey disbelieved such testimony. Clearly, under the principles so frequently announced by this Court, it was the jury's sole province to evaluate the explanations - ignored in the Court's opinion -- which Dovberg gave for the alleged inconsistencies.

Questions posed in the course of the reargument by other judges of the Court of Appeals who later voted with

the majority made it clear that these judges were influenced by such understandable, but nevertheless legally irrelevant, considerations as the size of the verdict as compared with the total volume of business which Schultz did with the petitioners and Papco, i.e., $3,300 with petitioners and $4,550 with Papco.

However, petitioners' was a small business. Their principal product, Nix-Size, was sold to Schultz for 30¢ a bottle. The dollar volume of business which petitioners did with any one customer was relatively small, but the evidence shows that the Schultz firm was one of petitioners' largest customers and that Schultz knew it (App. 27a). The dollar totals in question represented the equivalent of approximately 25,000 bottles of Nix-Size. Furthermore,

the Schultz firm was a leader, with seven widely distributed stores in the Philadelphia area. Obviously, the products which it handled and the prices which it charged for those products were keys to what others -- competitors of Schultz and customers of petitioners -- would handle and would pay. Finally, the evidence justified the jury in concluding that Liqui-Size was being marketed solely in an effort to destroy petitioners' little business, and that Schultz, with knowledge of what was occurring, chose to abandon petitioners and join Papco, not for any proper business motive, but because Schultz wished to hurt petitioners because they had refused to permit the Schultz firm to use their product -- which the Schultz firm was able to buy in larger quantities than its competitors

-- to hurt those competitors by selling the same beneath the standard fair trade prices.

Certainly, the jury was justified in concluding that, as between the petitioners and Schultz, Schultz should bear the brunt of the verdict. Indeed, if plaintiffs such as petitioners are not entitled to recover a verdict -- and more important, having persuaded a jury of the justice of their cause, if plaintiffs such as these are not entitled to hold a verdict -- against defendants such as Schultz, they are helpless against conduct which Congress has declared to be criminal and so contrary to public policy as to entitle <u>everyone</u> injured by such conduct to recover punitive damages from <u>all</u> <u>offenders</u>.

Other questions raised by Court of Appeals' judges who later voted with the majority indicated concern because retailers other than Schultz, who had also switched from Nix-Size to Liqui-Size and passed the latter off to the public as being Nix-Size, were not being assessed with any verdict. The fact is, however -- as the jury found by acquitting Atlas, the only other retailer against whom petitioners produced evidence, that the Schultz firm was in a position different from other retailers. It was more substantial. Admittedly, it had no difficulties selling substantial quantities of Nix-Size at its fair trade price. And unlike other retailers, Schultz was shown to have had positive knowledge of Papco's intentions at the time it elected to

abandon Nix-Size and market Liqui-Size.

As the proprietors of a business so small that it is entirely unlikely that their complaint could ever be the subject of a criminal prosecution by the United States against those who have injured them by violating the Sherman Act, little businessmen such as petitioners must depend entirely on litigation of this type to secure the relief required. And the Government of the United States must depend upon civil actions such as this to see that the policy of the Sherman Act is enforced in cases involving little business people as, by the broad terms of the statute, Congress clearly intended its policy to be enforced.

In such cases, the jury can be the shield of defendants as much as it can be the spear of the plaintiff. For the jury is as aware of the potential effect of its judgment on defendants who are small businessmen, as it is of the effect on the little plaintiff of the actions of the defendants who are small businessmen.[16] Therefore, in this type of case more than in any other, it should be the jury's province to resolve finally the issues of fact which the jury is called upon to resolve under the well settled principles which this

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16. The verdict here, before being trebled, was approximately one third the sum for which petitioners' counsel argued that the jury could return a verdict, under the evidence.

Court announces in other cases which, individually, may have greater public significance.

In MONTAGUE & CO. v. LOWRY, 193 U.S. 38 (1904), this Court granted certiorari and then affirmed a jury verdict of only $500 in a civil anti-trust case. One of the principal contentions of the defendant was (193 U.S. 46) the assertion that "***the sale of unset tiles (the product involved) is so small in San Francisco as to be a negligible quantity; that it does not amount to 1% of the business of the dealers in tiles in that City." But, in affirming the jury's verdict, this Court noted (193 U.S. 46): "***The amount of trade in the commodity is not very material, but***the combination, if carried out, directly effects a restraint of interstate commerce."

In MONTAGUE, this Court granted certiorari because of the principle involved, notwithstanding the size of the verdict. We ask that this Court grant certiorari here because, while the sums involved are "negligible", at least in terms of the public interest, the principle of the case is of vital significance, namely, that acts which are wrong under the Sherman Act are wrong when committed by small businessmen or large businessmen, and when a jury has determined that such a wrong has occurred and has awarded a plaintiff an appropriate verdict, that verdict must be viewed and upheld in accordance with the same principles applicable when larger businesses are involved.

Notwithstanding the sums involved, the attorneys for the parties in this case tried the case long and carefully

before a judge experienced in this field. That jurist, prior to the verdict, would seem to have been aware of the significance of the case, for he took the trouble to write a 75-page memorandum in the course of the trial and to prepare a charge annotated with citations and submitted to counsel for suggestions before it was read to the jury. A jury took four months from their collective lives to hear the case, to deliberate carefully, and then to render a decision which was both discriminating and in accordance with the trial judge's charge. On appeal, three judges, two of them the seniors in the circuit, reviewed the entire record and the two seniors voted to uphold the verdict. Then the entire Court of Appeals heard the matter reargued and

joined in writing two comprehensive opinions. Unfortunately, the opinion of the majority went off on a patently erroneous factual consideration so that, at this point, the matter has lost all public significance.

This case can be accorded the public significance to which it is entitled only if this Court will grant certiorari and pass on the real and substantial issues which the case does present.

Respectfully submitted,

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